

I. F. Stone's Weekly

VOL. VII, NO. 48

DECEMBER 21, 1959



WASHINGTON, D. C.

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The Whittling Away of the First Amendment

The deep cleft within the Supreme Court on First Amendment rights was again visible in the California obscenity case decided last week. On one side, Mr. Justice Black believes that the First Amendment means what it says, that Congress shall make "no law . . . abridging the freedom of speech or of the press" and that the word "liberty" in the Fourteenth Amendment, which binds the State Legislatures, must be read almost as strictly. On the other side, Mr. Justice Frankfurter would blur the clear mandate of the First Amendment by reading it as if it said that the interest in free expression can be balanced against other interests of the community.

The "balancing" doctrine invites exceptions. The exceptions as they accumulate undermine fundamental safeguards. Sometimes the motives may seem good or bad, but the net effect is the same. Mr. Justice Frankfurter's first major success was the *Beauharnais* case in 1952. With Jackson Black, Douglas and Reed dissenting, Frankfurter wrote a 5-4 decision upholding an Illinois racial libel law. There he balanced the interest in free speech against the interest in racial peace. Two years ago, on the issue of obscene literature, he won over the otherwise liberal Mr. Justice Brennan to the "balancing" doctrine in the *Roth* case. There the interest in a free press was balanced against a public interest in suppressing pornographic literature.

What Interest More Important Than Free Speech?

In the California case, the Court was unanimous in agreeing that the California obscene literature statute was unconstitutional, but the court split five ways in reaching the result. The position most favorable to censorship was taken by Mr. Justice Frankfurter, who insists on interpreting the First Amendment in the light of the Eighteenth Century common law though the purpose of the Amendment was to make sure that the English law's restrictive doctrines in politics, morality and religion would not be applicable to speech and press in this country. Mr. Justice Brennan held the California law void on a thin technicality easily remedied by those who want censorship. In the very act of opposing censorship in this case, the majority repeated the "balancing" doctrine which opens the way to it in others. Mr. Justice Brennan quoted the words he used two years ago in the *Roth* decision saying "the door barring federal and state intrusion" into the area of free speech and press "must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

It is these "slight cracks" which Mr. Justice Black fears. "What," he asks, "are the 'more important' interests for the protection of which constitutional freedoms of speech and press must be given second place?" He wants to know what is the standard "by which one can determine when abridg-

ment of speech and press goes 'too far'?" He sees censorship as "the deadly enemy of freedom and progress" and protests, "the plain language of the Constitution forbids it." He warns, "While it is 'obsenity and indecency' before us today, the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political, and maybe with the religious unorthodoxy of tomorrow."

A Handy Weapon for Southern Racists

The "balancing" theory has already borne bitter fruit in the political field. The *Barenblatt* and *Uphaus* decisions were based on the view that the right of Congress or the States to investigate supposed Communist conspiracy overbalanced the inhibitory effect of witch hunt investigations on First Amendment freedoms. The day the Court handed down the California decision, Dr. Willard Uphaus was sentenced to one year in jail in New Hampshire for refusing to hand over to a Red-hunting Attorney General a list of guests at his "peace fellowship" camp in that State. Some 30 others are headed for jail under the interpretation of the First Amendment applied in the *Barenblatt* and *Uphaus* decisions. In the case of one of them, Carl Braden, the Fifth Circuit Court of Appeals in Atlanta a few days before* showed how effective a weapon this placed in the hands of Southern white racists.

The Fifth Circuit upheld Mr. Braden's conviction for contempt of the Un-American Activities Committee. He had refused on First Amendment grounds to answer questions about his activities on behalf of racial justice in the South. The Court ruled that "Legislative purposes might be furthered by a determination of whether organizations ostensibly active in championing timely objectives, such as integration and civil rights, are in fact being used for the spread of the propaganda of a foreign dominated Communist organization with subversive designs . . . one who is known or believed to be a Communist and is suspected of being engaged in un-American activities does not acquire immunity by adopting the role of a racial integrationist."

J. B. Matthews Back at Work

This, which applies the "balancing" doctrine as embodied in *Barenblatt*, is made to order for Southern bigots who see the struggle of the Negro for full emancipation as a Red plot. They can use Congressional and State witch hunt committees to pillory every man, white or black, who fights for racial justice, as J. B. Matthews, long discredited in the North, is even now doing for a Mississippi legislative committee which recently smeared Hodding Carter as a Red.

* At press time we learned the same Circuit had upheld the contempt conviction of Frank Wilkinson.

New Kefauver Hearings. Expose Gypping of Sick and Aged by Medicine Combines

The Realities of "Free Enterprise" As Practiced in the Drug Business

For two years a Senate Judiciary subcommittee on anti-trust and monopoly under Senator Estes Kefauver of Tennessee has been exploring the realities of the free enterprise system with little or no attention in the press. Hearings have covered the way in which the steel, auto, bread, oil and milk industries have managed to exempt themselves at consumer expense from the free market, substituting administered prices fixed at whatever the commissars of big business think the traffic will bear.

But nobody seemed to care until this month Kefauver extended his inquiry into the drug business. His week of hearings Dec. 7-12 into the pricing of the new "wonder drugs" for arthritis and rheumatism for the first time drew full coverage by press, TV and radio. Among the contributing reasons: the hearings were held at the dullest time of the year for news-hungry Washington reporters; the so-called ethical pharmaceutical industry which makes these drugs confines its advertising to special publications for physicians only and thus has no hold over the press; high drug prices painfully affect elderly folk living on inadequate pensions.

The Doctor Orders, the Patient Pays

The keystone of the high price system in ethical drugs (as distinct from patent medicines) is that they can be bought only on a doctor's prescription. He usually orders by the brand name, though the identical product meeting the same USP standards is often available much cheaper from smaller manufacturers under the drug's generic or "real" name. "The drug industry is unusual," as Senator Kefauver explained in opening the hearings, "in that he who buys does not order and he who orders does not buy." Thus prednisone, one of the new variations of the cortisteroids, can be obtained in bulk from Syntex, Inc., a Mexico-based independent, at \$11.80 and 1,000 5 mgm tablets produced from it (after allowance for wastage, tableting and bottling) at \$13.60. The same quantity purchased by the druggist from Schering, Merck or Upjohn costs \$170 and the price to the consumer

On Salk Vaccine

"The large pharmaceutical manufacturers have no monopoly on research . . . they do have a monopoly on the profits derived from the basic research done by others . . . the funds necessary for the development of the Salk vaccine were contributed mainly by public donations. The profit from the \$53,000,000 sales, at wholesale level, was shared by five large drug concerns."

—Seymour N. Blackman, *Premo Pharmaceutical Lab.*, to the Kefauver drug hearings, Dec. 11.

is \$283.33. A public relations firm hastily submitted an analysis from something called the U. S. Economics Corporation which also showed a wide spread between wheat and bread, cotton and cotton shirts. "This would be pertinent," Kefauver commented dryly, "if you bought a loaf of bread and all you did was put a wrapper on it and then resold it." The high sales costs cited by the companies in defense of such 1,000 percent or more spreads goes for high priced salesmen called "detail men" who talk the physician into prescribing by brand name. The result has been a bonanza for the big drug manufacturers; the more they spend on propagandizing the physician, the higher the price they can exact from his patients.

This is only the first in a series of hearings Kefauver plans into the drug business. He presided over the first week with admirable grasp of complicated details and a capacity to cut swiftly through the fog generated by slick drug executives. Wisconsin's Republican Senator Wiley, battling manfully to defend the drug companies, protested, "What business has this committee got to tell anybody in any business what they should charge?" But before the hearings are over, millions may be asking why medicines should be at the mercy of drug combines, exploiting overworked physicians and patent monopolies to get every penny they can from the sick and aged. On this and the next page we present a few samplings of the realities and the slippery apologetics.

Nothing Like Good Old Fashioned U. S. Competition to Keep Drug Prices Down

"So let Europe have its cartels, and Russia its state monopoly. We'll take a thousand fiercely competitive companies duplicating each other's efforts, driving each other's prices down . . ."

—*Editorial in Current Medical Digest, Nov. 1959, quoted as the peroration of an address by Austin Smith, M.D., president of the Pharmaceutical Mfrs. Assoc., New York, Dec. 9, in which he attacked the Kefauver inquiry into high drug prices as a move to socialize medicine.*

Sen. KEFAUVER: I still don't understand why people in London get this [anti-arthritis] drug at the drug stores at \$7.53 and our drug stores have to pay \$17.90?

Mr. CONNOR [Pres. of Merck]: Mr. Chairman we meet different market conditions in different countries.

—*Kefauver committee drug hearings, Dec. 9.*

Sen. KEFAUVER: How did it happen that you [Merck] and Upjohn and Schering all arrived at exactly the same price of \$17.90?

Mr. KURYLOSKI [Merck's director of marketing]: Well, sir, we entered the market later following Schering by several months, and as with any commodity which is identical, we felt it to our advantage to meet their price.

Sen. KEFAUVER: You just followed their price exactly? Mr. KURYLOSKI: Yes, we did.

—*Same hearing, same day.*

"This particular matter [of high drug prices] was called to my attention when our very fine Governor, Leroy Collins, made a trip with ten other Governors to the Soviet Union just this year, and when he returned he told me that he suffered from an illness while in the Soviet Union, a recurrence of an illness which he had here in Florida. He took the same prescription which had been given to him in Florida and whereas it cost him here in Florida in the neighborhood of something like \$18 for the little bottle of pills which he had to have, over there it cost him actually less than \$2 and he said it began to make him wonder what it was all about."

—*Sen. Smathers (Fla.) Kefauver drug hearing, Dec. 7.*

"Schering cannot expand its markets by lowering prices . . . Undoubtedly some people find it difficult to pay for needed medication. They will also have difficulty in meeting their rent and food bills as well . . . It is a matter of inadequate income rather than excessive prices."

Francis C. Brown, *Pres. of Schering, Dec. 7.*

How Serious Side Effects of the Latest Anti-Arthritic "Wonder Drug" Were Explained Away**Nobel Prize Winner Appears As Witness to Defend Merck's Advertising**

Dr. [John M.] BLAIR [Chief Economist, Kefauver committee]: Mr. Chairman, the first [Merck] advertisement which I will read . . . goes on to state, "In the past it was frequently impossible to administer corticosteroids in adequate amounts because therapeutic dosage was perilously close to that capable of causing major undesirable effects. With decadron, a far more specific anti-inflammatory steroid, side effects are no longer serious limitation . . ."

Senator WILEY: Is that an improper statement?

Dr. [Louis] LASAGNA [Johns Hopkins Univ., consultant to the American Medical Association on advertising for its Journal]: Yes, sir, I think it is.

Senator WILEY: In what way?

Dr. LASAGNA: The clinical literature that I have read indicates the side effects are a serious consideration . . .

Dr. BLAIR: The next one I have says . . . "decadron marks the end of the transitional product development era and the arrival of mature corticosteroid therapy."

Dr. LASAGNA: If I understand that ad, it would imply that a qualitative advance has been made with decadron which I do not believe to be the case.

Mr. DIXON: Do you think it perhaps would mislead an ordinary physician?

Dr. LASAGNA: In my opinion, sir, it would imply a safety for this drug which I do not think it possesses . . .

Wiley Sees Nothing Wrong

Sen. WILEY: Will you tell us specifically what was wrong with it?

Dr. LASAGNA: It implies that this drug as contrasted with the previous steroids . . . has almost no danger associated with it . . . I think that is not the case, sir.

Sen. WILEY: Is that the only objection you have to it?

Dr. LASAGNA: That is a pretty big objection, sir, in my book, I don't know about yours. I speak only as a physician, sir . . .

Mr. John T. CONNOR, president of Merck & Co. In view of Dr. Lasagna's testimony, Mr. Chairman, I would suggest that you call Dr. Philip S. Hench . . . the outstanding rheumatologist who won a Nobel Prize for his work in this very field . . .

Mr. DIXON: The point here of these advertisements, as they appear to me, all the favorable things have been stated, but how about the unfavorable things? . . .

Dr. HENCH: With all respect to you I had hoped that I might be able to give some generalizations before we got down to these individual points. . . . May I say that the most important thing that has been left out is the definition of what we mean by side effects. Side effects is actually nothing more or less than the normal effects of cortisone . . .

Mr. DIXON: I have heard it mentioned that in treating rheumatoid arthritis, that one of the most common toxic effects or what you call side effects might be a peptic ulcer . . . would you call that a toxic effect?

Dr. HENCH: You are without impropriety forcing me to antedate myself but I will answer that. . . . Most physicians do not distinguish properly between side effects and what you are trying to express which I would call complications,

On Selling Medicines Like Mouse Traps

"Today the builder of better mouse traps will sell more mouse traps only if he builds a path to the world and presents the advantages of his trap with more ingenuity and impact than his competitor.

"It is such activity as this which, in the aggregate, has caused the ethical pharmaceutical industry of this country to provide, during the past year, 3,790,908,000 pages of paid journal advertising; 741,213,700 direct mail impressions, and well in excess of 18 to 20 million physician and pharmacist calls."

—Walter I. Griffith, director product advertising Parke, Davis & Co., *Proceedings of the Mid Year 1959 Conference of Apothecaries*, quoted by Seymour N. Blackman of Premo Pharmaceutical to the Kefauver Committee drug inquiry, Dec. 11.

and they are not the same . . .

Sen. KEFAUVER: Have you examined this last advertisement sent out by Merck the front page of which said, "Therapeutic response highest ever reported decadron incidence of side effects the lowest ever reported." Have you? . . . Do you subscribe to that?

Dr. HENCH: I'm sorry . . .

Sen. KEFAUVER: I am just asking you about what is on the front page of this.

Dr. HENCH: I am not trying to avoid the issue.

Sen. KEFAUVER: Lowest side effects ever reported. Do you agree to that? . . .

Dr. HENCH: I am not going to avoid the answer. May I say this: That at the very beginning or in the first year or two much of the publicity on Merck and Company was submitted to me and my colleagues, and the same as to Upjohn. They were very careful. They were most responsive to our suggestions, and without any feeling of responsibility except a moral one on my part I approved the tendencies, the trends and the type of publicity they had had. In general, I do.

However, realize this: that any publicity, any publicity is for a particular purpose. For example, if you have only three or four sentences on a whole page, that is merely in the line of being a headline. Well, now, the newspapermen know the limitations and virtues of a headline. Every headline has to be qualified by what follows it, and these short statements are qualified in advertisements in all sorts of ways in the Merck handbook and papers that are put out by them and by other companies so that when you get down, when you have read the whole thing, any misinterpretation that you might have had in one way or the other from a headline should be fairly well corrected.

Mr. DIXON: Dr. Hench, you said earlier that these statements were submitted to you.

Dr. HENCH: I merely meant that I haven't seen them in the last four or five years except as I see them in the mail.

Mr. DIXON: When they were received by you, did you receive any compensation for your—

Dr. HENCH: None whatsoever, sir. I have no connection whatever with Merck's.

Mr. DIXON: You have none?

Dr. HENCH: I came here voluntarily because of my admiration for Merck . . .

—Kefauver drug hearings, Dec. 10

Senator Young on Loyalty Oaths for School Lunches; More Mush Than Message in "On the Beach"

Invite Franco to Return Ike's Visit, But Only If He Intends to Stay

Franco's well-heeled Washington lobby is working hard to get him an invitation to visit the U. S., and counter pressure is needed fast if they are not to succeed; a few months ago, the President's visit to Spain seemed impossible, but they pulled it off. Friends of Spanish freedom ought to raise the slogan, "Invite Franco Here, But Only If He Intends to Stay." The *New York Times* (Dec. 16) reports a protest from Salvador de Madariaga against Ike's visit to France as dangerous "for the moral defenses of the West." The *London Times* (Dec. 9) reports from Madrid that monarchists as well as moderate republicans are circulating secret leaflets deploring the visit. It makes "free world" rhetoric seem a mockery to every section of the Spanish people except Franco's hangers-on.

Our Hat Is Off to Senator Young

Senator Stephen M. Young (D. Ohio) provided a breath of free air in telling off the American Legion and appearing—despite its protests—to speak at the Emergency Civil Liberties Committee Bill of Rights dinner last week. Thanks to the Legion's protest and the Senator's salty blast in reply, which the *New York Times* played on page one, the dinner was a sell-out and the largest ever. The Legion seems to have been alerted by the FBI, which thinks itself authorized to spend public funds harassing any organization which dares to criticize G-men. High point of the Senator's speech was his suggestion, in attacking education act loyalty oaths, "Why not require a child receiving lunch under the school lunch program to take the same oath before being permitted to drink a glass of milk." The Legion may like the idea.

Too Much Mush Per Megaton

As a Hollywood product, "On the Beach" deserves the highest applause and everybody should see this film about the world's end in nuclear war. But from an adult point of view, it was disappointing. Most of it was boy-meet-girl of the callowest moon calf type. There was only one speech that hit anywhere near the theme, an outburst by a scientist in a U. S. submarine but his message seemed to be that

Personal Bows (and Blushes) Dept.

"I am delighted to hear that Mr. I. F. Stone will receive the Tom Paine Award on Dec. 15, and I wish I could be with you on this occasion. Since this is impossible, I would like to send my greetings and warm congratulations to Mr. Stone. He richly deserves the tribute you are paying him."

—Eleanor Roosevelt

"I am very glad indeed that Mr. I. F. Stone is receiving the Tom Paine Award. I am a regular reader of his Weekly which I find full of valuable information not easily attainable elsewhere. I value highly his services in the cause of peace and sanity, and it is good to know that the Emergency Civil Liberties Committee is recognizing them as they deserve."

—Bertrand Russell

"I have great admiration for I. F. Stone, and I hope you will express to him my appreciation for his newsletter, for the careful research he does on important measures in Washington, and for the clear way in which he reports them. It is one of the best jobs of reporting that comes across my desk. He succeeds in being analytical and critical without being bitter, and that is a real accomplishment."

—Clarence E. Pickett

From letters to the Emergency Civil Liberties Committee on its Tom Paine Award to I. F. Stone, Dec. 15.

the world had destroyed itself because men relied on weapons they couldn't use without mutual suicide. The lesson seemed to be that they would have been better advised to kill each other with less comprehensive weapons. The deadliness of human hatred, the need for co-existence (practically a subversive word!), were not touched upon. The final shot of a Salvation Army banner, "There's Still Time Brother", helped to redeem the picture. But we found it defeatist. This picture of Australians lying down to die reflects the current American mood, we'd rather drift to catastrophe than fight against the stereotyped thinking and mindless military machine that rolls on to disaster.

Warmest Holiday Greetings and Best Wishes for the 1960's to All Our Good Readers

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I. F. Stone's Weekly

5618 Nebraska Ave., N. W.

Washington 15, D. C.

NEWSPAPER

Entered as
Second Class Mail
Matter
Washington, D. C.
Post Office

The Weekly Is Not Published the Last Two Thursdays in December, Next Issue Jan. 11